

Galvin Holdings, LLC v iStar Fin. Inc.

2009 NY Slip Op 32939(U)

December 15, 2009

Supreme Court, New York County

Docket Number: 107860/09

Judge: Walter B. Tolub

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SCANNED ON 12/17/2009
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB

PART 15

Index Number : 107860/2009
GALVIN HOLDINGS, LLC
VS.
ISTAR FINANCIAL INC.
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

RECEIVED

DEC 15 2009

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

FILED

DEC 17 2009

NEW YORK
COUNTY CLERK

Handwritten signature

Dated: 12/15/09

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WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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GALVIN HOLDINGS, LLC, GALVIN FLYING SERVICES,
INC., GALVIN FLYING, INC., GALVIN AVIATION,
LLC, AVIATION FUEL DISTRIBUTORS, LLC

Plaintiffs,

-against-

iSTAR FINANCIAL INC., and SFT I, INC.,
Defendants

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Index No.
107860/09

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Tolub, J.:

Defendants move, pursuant to CPLR 3211 (a) (1) and (7), for a judgment dismissing the complaint as against them, with prejudice. On September 28, 2007, plaintiffs, as borrowers, and defendant SFT I, Inc. (SFT), as lender, entered into a Loan and Security Agreement (the Agreement). Plaintiffs are the largest leaseholder and leading provider of fixed-base airport operations at Boeing Field in Seattle, Washington. Defendant iStar Financial Inc. (iStar), SFT's corporate parent, is not a signatory to the Agreement.

Pursuant to the Agreement, SFT agreed to provide a \$17 million loan to plaintiffs, to be used to pay the cost of acquiring a leasehold interest, among other things. The Agreement provides, at section 2.1 (B), that SFT will lend a second tranche of funding (the Development Funds) in an amount equal to 70% of the cost of the project, up to a maximum of \$13,000,000, upon satisfaction of delivery requirements set forth in Addendum A to the Agreement.

Addendum A states that SFT and plaintiffs:

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acknowledge that as of the Closing Date the Project has not been finalized and, as a result thereof, certain essential terms to this Addendum A remain blank. [SFT] and [plaintiffs] agree that at such time that the Project has been finalized, as evidenced by [plaintiffs'] delivery to [SFT] of the Plans and Specifications, [plaintiffs] and [SFT] shall work together in good faith to complete this Addendum upon terms that are mutually agreeable to

them. Defendants point out that there are more than 25 blanks in Addendum A reflecting "essential terms" upon which the parties had not yet agreed.

The complaint alleges five causes of action: 1) anticipatory repudiation based on defendants' refusal to negotiate and loan the Development Funds; 2) breach of contract, based on SFT's failure to advance the Development Funds, in breach of section 2.1 (B) of the Agreement; 3) breach of the express covenant of good faith and fair dealing, for defendants' refusal to work in good faith with plaintiffs to complete Addendum A; 4) breach of the implied covenant of good faith and fair dealing, for defendants' failure to negotiate in good faith with plaintiffs; and 5) unjust enrichment, based on defendants' keeping a commitment fee that was paid upon closing of the Agreement.

Plaintiffs state that the credit crisis and subsequent economic downturn in 2008 had a severe negative effect on defendants' business, and resulted in significantly reduced levels of liquidity available to finance defendants' operation. According to plaintiffs, as a result, defendants chose to repudiate the commitment to advance the Development Funds.

Plaintiffs state that during a February 9, 2009 conference call, Barclay Jones (Jones), then executive vice president-investments for iStar, repudiated the Agreement, by telling plaintiffs, "Guys, we just are not going to do this deal, we're just not going to do it." According to plaintiffs, Jones also stated that "We never would have done this deal if we knew it [the meltdown of the financial system] would have turned out like this."

Plaintiffs allege that, after iStar's February 9, 2009 repudiation, they demanded assurances that defendants would perform their obligations under the Agreement, including negotiating in good faith to complete Addendum A and advancing the Development Funds. On March 3, 2009, SFT wrote plaintiffs a letter stating that it "stands ready and willing to continue its dialogue with" plaintiffs, and in a March 18, 2009 letter, defendants reiterated their commitment to negotiating. According to plaintiffs, the letters purport to simultaneously deny and retract the repudiation. Plaintiffs argue that defendants wrote the letters to shield themselves from the effects of the repudiation.

Plaintiffs maintain that in the March 18, 2009 letter, defendants listed many allegedly "open items" that prevented them from moving forward on completing Addendum A. Plaintiffs contend, however, that all of the "open items" that could be completed without the issuance of a permit had already been completed and submitted to defendants. Plaintiffs maintain that the only true "open items" were those that plaintiffs could not remedy without

defendants' assurances that they were willing and able to advance the Development Funds. According to plaintiffs, the "open items" were a pretense for defendants' failure to abide by their obligation to negotiate in good faith the missing "essential items" of Addendum A and to advance the Development Funds.

Defendants argue that the complaint should be dismissed in its entirety as a matter of law. They maintain that all claims should be dismissed against iStar, which is not a signatory to the Agreement, nor is it defined therein as the "Lender." The Agreement names SFT as the sole lender. The Agreement, in section 11.7, states that it "is made for the sole benefit of [SFT] and [plaintiffs], and no other Person shall be deemed to have any privity of contract hereunder." Thus, defendants argue that no claim is permitted based on a theory that iStar shared any of SFT's obligations under the Agreement.

Plaintiffs state that iStar should not be dismissed from the instant action. They assert that all of their negotiations were with iStar, and that on June 27, 2007, iStar delivered a commitment letter on its own letterhead to plaintiffs. The letter outlined the basic terms and conditions of the proposed facility, and represented the parties' binding obligation to negotiate in good faith to produce and enter into definitive loan documents in accordance with the terms set forth therein.

Plaintiffs state that, while SFT was nominally the lender, it merely acted as a conduit for iStar, the actual funding source for

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the Agreement. Plaintiffs point out that Schedule 2.4 (a) of the Agreement provides wiring instructions to iStar's bank account, and Schedule 11.5 provides iStar's New York address for all notices to the lender.

This court finds that iStar should be dismissed as a defendant from the instant action. The Agreement, entered into by sophisticated parties, is clear in naming SFT as the sole lender. iStar could not have repudiated or breached the Agreement, which it did not enter into. Therefore, iStar is dismissed from the instant action. See e.g. *Blitman Constr. Corp. v Kent Vil. Hous. Co.*, 91 AD2d 173, 176-77 (1st Dept 1983).

Defendants assert that the remedies plaintiff can seek are limited by the Agreement. They point out that section 11.2 of the Agreement states, in part, that "[i]n any action or proceeding brought by [plaintiffs] against [SFT] claiming or based upon an allegation that [SFT] unreasonably withheld its consent to or approval of a proposed act by [plaintiffs] which requires [SFT's] consent hereunder, [plaintiffs'] sole and exclusive remedy in said action or proceeding shall be injunctive relief or specific performance requiring [SFT] to grant such consent or approval."

Defendants maintain that the parties further agreed to limit the remedies available for any breach by providing, in capital letters, in section 11.2 of the Agreement, that "NEITHER BORROWER NOR LENDER SHALL HAVE ANY LIABILITY HEREUNDER FOR ANY CONSEQUENTIAL, SPECIAL, PUNITIVE OR INDIRECT DAMAGES." Defendants

[*7]
state that plaintiffs nonetheless seek consequential damages in each count of the complaint.

This court finds that that part of section 11.2 of the Agreement that limits plaintiffs to injunctive relief or specific performance is inapplicable herein, because plaintiffs were not seeking defendants' consent to or approval of any proposed action. That part of section 11.2 that limits damages by disallowing consequential, special, punitive or indirect damages is applicable, however, and, if SFT is found liable to plaintiffs under any of the claims in the complaint, the damages plaintiffs can collect will be restricted thereby. See *Smith-Hoy v AMC Prop. Evaluations, Inc.*, 52 AD3d 809, 810 (2d Dept 2008) (holding that a "clear contractual provision limiting damages is enforceable absent a special relationship between the parties, a statutory prohibition, or an overriding public policy").

Defendants seek dismissal of all five causes of action in the complaint. On a motion to dismiss, the allegations in the complaint must be deemed to be true. *Leon v Martinez*, 84 NY2d 83, 87 (1994).

Defendants assert that the first count should be dismissed because the allegations in the complaint and the statements in the letters incorporated into the complaint by reference fail to state a claim for anticipatory repudiation. The first cause of action is dismissed. It is arguable that the statement in the February 9, 2009 conference call may have been a repudiation, expressing "a

definite and final communication of the intention to forego performance." *Rachmani Corp. v 9 E. 96th St. Apt. Corp.*, 211 AD2d 262, 267 (1st Dept 1995).

Even so, the March 3 and March 18, 2009 letters from SFT to plaintiffs affirmed its willingness to proceed with the negotiations. A party may revoke its repudiation where plaintiffs do not show that they "materially changed their position in reliance on the defendants' anticipatory repudiation ... before the repudiation was retracted." *Silverman Perlstein & Acampora v Reckson Operating Partnership*, 303 AD2d 576, 577 (2d Dept 2003). Plaintiffs do not plead that they materially changed their position between the February 9, 2009 conference call and their receipt of SFT's letters the following month. Thus, if there was a repudiation, it was revoked by SFT, such that the first cause of action is dismissed.

According to defendants, the second cause of action, alleging breach of section 2.1 (B) of the Agreement, should be dismissed. That section deals with the Development Funds to be provided upon satisfaction of the delivery requirements set forth in Addendum A. It is undisputed that those delivery requirements have not yet been met, such that SFT's obligations under section 2.1 (B) are not yet triggered. Therefore, the second cause of action is dismissed.

Defendants contend that the third claim, for breach of an express duty in the Addendum to negotiate in good faith, should be dismissed. Defendants contend that Addendum A provides only an

unenforceable agreement to agree, not a binding agreement. The preamble to Addendum A acknowledges that some "essential terms" remain blank, and obligates the parties to "work together in good faith to complete this Addendum upon terms that are mutually agreeable to Lender and Borrower." When there are material terms missing in a contract, and parties agree to negotiate those terms in good faith, such a statement constitutes a mere agreement to agree, which is not enforceable. *Yan's Video v Hong Kong TV Video Programs*, 133 AD2d 575, 578 (1st Dept 1987). Therefore, the third cause of action is dismissed.

Defendants argue that the fourth cause of action, sounding in breach of the implied duty of good faith and fair dealing, for defendants' failure to negotiate with plaintiffs in good faith, should be dismissed as duplicative of the third count and fails to state a claim. This court has found that the terms of Addendum A are not enforceable, such that it cannot find any implied duty therein. Therefore the fourth cause of action is dismissed.

According to defendants, the fifth claim, alleging unjust enrichment for retaining a commitment fee, should be dismissed. In their opposition to the instant motion, plaintiffs do not offer any opposition to dismissing the fifth cause of action. The Agreement sets forth the amount of the commitment fee, and although it is calculated based on a total loan amount of \$30,000,000, there is no mention of any part of the fee being refunded if less than \$30,000,000 is ultimately loaned by SFT to plaintiffs. The

Agreement governs the subject matter of the claim and of the commitment fee, such that there is no viable claim for unjust enrichment. "Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory on unjust enrichment for events arising out of that subject matter is ordinarily precluded." *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 (2009).

Accordingly, it is

ORDERED that the motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 12/15/09

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